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Dee Jay Bigler and Carol Bigler v. Mapleton Irrigation Canal Co et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

DEE JAY BIGLER and CAROL BIGLER, his wife,

Plaintiffs-Respondents,

vs.

MAPLETON IRRIGATION CANAL COMPANY and JOHN DOES I, II and III,

Defendants-Appellants.

CASE NO. 18,256

BRIEF OF RESPONDENTS DEE JAY BIGLER AND CAROL BIGLER, HIS WIFE

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
THE HONORABLE GEORGE E. BALLIF
DISTRICT JUDGE

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NATURE OF CASE

This is an action based on the negligent flooding of the plaintiffs-respondents' property.

DISPOSITION IN THE LOWER COURT

The action was tried on the 20th, 21st and 25th of January, 1982. The case was then submitted to a jury to answer questions on a special verdict form. The jury found the defendant, Mapleton Irrigation Canal Company, negligent and awarded damages to the plaintiffs-respondents in the amount of $8,361.70. It is from that judgment that the defendant appeals.

RELIEF SOUGHT ON APPEAL

Plaintiffs-respondents seek to have the judgment of the lower court affirmed.

STATEMENT OF FACTS

The plaintiffs-respondents, Dee Jay Bigler and Carol Bigler,

are shareholders in the defendant Mapleton Irrigation Canal Company, owning one share of Hobblecreek and one share of Strawberry Water (R. 196). The plaintiffs have been residents of the city of Mapleton for fourteen years and have occupied the home that was flooded for twelve years (R. 191, 384). During that entire period of time the plaintiffs have been irrigating the .97 acre parcel of land where their home is located with water procured through the defendant irrigation company (R. 191, 384).

The water that is turned into the lateral that services the plaintiffs' property originates in the Strawberry Canal which carries ninety second feet of water and flows year around (R. 285). The water is diverted from the Strawberry Canal into the Fullmer Ditch by lifting a headgate which is locked and secured and can be unlocked only by the defendant's water master (R. 285). The Fullmer Ditch usually only carries six second feet of water, but on the date of the incident, was carrying twelve second feet or two streams of water (R. 286-87). From the Fullmer Ditch, water is diverted at a concrete headgate into a lateral that serves the plaintiffs and nine other property owners who use the water from one-half hour to two hours each (R. 287-90, Ex. 19, 20).

The ditch that runs by the plaintiffs' property and the other nine property owners dead-ends at the property of the tenth landowner (Julander and Mayberry) and is not used to transport water to any other area, to irrigate other land or to transport waste water (R. 203). Accordingly, unless the ten property owners are scheduled

for irrigation, there is no water in the ditch that runs by the plaintiffs' property (R. 203, 232, 128-30).

Lewis Snow, the seventy year old water master for the defendant company, testified he had been the water master for fourteen years and was paid a salary of Eight Thousand Dollars a year (R. 269). Mr. Snow established that it was his responsibility to check the headgates and insure they were in good repair (R. 271). Snow, recognizing the potential danger of flooding and the dangers created by the water, testified that it was the company's responsibility to make sure that its employees knew where the irrigation water was at any given time (R. 272, 275) and to keep an accurate written record of the location and use of the water (R.272, Ex. 18). Snow testified that during the fourteen years of his service, he had always known where the water was (R. 290). Snow further testified that he had purchased locks for the headgates on the main canal and it was the policy of the defendant to keep them locked (R. 280).

With regard to how the shareholders are informed as to an upcoming water turn, the defendant, through answers to interrogatories and live testimony, established that the watermaster informed the stockholders of the upcoming water turns by making a personal call or by having a person up the ditch notify them (R. 281, 282, 20). The defendant's policy was that if the shareholder was not notified, water would not be turned to the shareholder (R. 281, 282, 20). Several shareholders testified that they had never or seldom been contacted by the watermaster about an upcoming turn (R. 263, 196, 197, 385-86).

The plaintiffs and the watermaster, Lewis Snow, all testified that in fourteen years, the water had never been in the ditch that services the plaintiffs' property unless prior notice had been given (R. 282, 288, 204, 387). Snow testified that shareholders had a right to believe they did not have to worry about water coming down the ditch unexpectedly (R. 281, 282, 288, 289, 314), and the plaintiffs testified that they did not think there was any risk that the water would be in the ditch unexpectedly (R. 204, 205, 257, 387).

The landowners along the ditch in question would have a water turn, depending on the time of year, every ten days to three weeks, but never more often than every ten days (R. 204, 391-2, 287). Needless to say, the water had never been back in the ditch the day after the irrigation turns had been completed by the ten property owners (R. 203-4 387-88, 391).

The plaintiffs are usually the next-to-last property owners to irrigate on the ditch in question, Julander and Mayberry being the last users (R. 135, 211). Only on four occasions, in the plaintiffs' experience, had they been the last to irrigate (R. 49, 386).

At nine-thirty, a.m., on August 24, 1979, Mrs. Bigler received a call from an up-ditch user that the water would arrive at the plaintiffs' property at approximately two o'clock, p.m., (R. 388). The plaintiff, Carol Bigler, had planned to leave and do some school shopping for her four children that morning, but before leaving, was informed by Melvina Johnson that the water would not arrive at the plaintiffs' property until three-

thirty in the afternoon (R. 388). The plaintiff, Carol Bigler, went shopping and returned at two o'clock in the afternoon to find that the watermaster had turned the water earlier than expected and that Julanders (normally the last person to use the water) had commenced irrigating (R. 388-89).

Julanders informed the plaintiff, Carol Bigler, that he had told the watermaster to turn the water out of the ditch at three-thirty, the time Julander would be through irrigating, and if Biglers wanted to water they would have to contact the watermaster (R. 328, 389).

The plaintiff, Carol Bigler, contacted the watermaster, Lewis Snow, and he agreed not to turn the water out of the ditch until four-thirty, p.m., (R. 328, 389-90).

Devan Bigler, the fourteen year old son of the plaintiffs, who had irrigated by himself for four years (R. 327, 391, 206), was informed by Julander at three-thirty that Biglers could put in their headgate to divert the water onto the Bigler property (R. 328-29). Devan put in the headgates so that all the water from the ditch would go on the Bigler property and no additional water would go down the ditch to Julander and Mayberry (R. 329). The plaintiff, D. J. Bigler, came home from work during the turn and checked with his son (R. 212). At four-thirty, the water was shut off by the watermaster and accordingly the water quit flowing in the ditch (R. 329-30, 293).

Devan left the headgate in so that the small amount of water remaining in the ditch would not flow down to Julanders, who was apprehensive about additional water after his turn was

completed (R. 201, 202, 407). The last person to use the water on the ditch routinely left the headgate in for the next turn because there was no chance of flooding or water coming down unexpectedly (R. 204, 205, 206, 257, 332, 387).

The plaintiff, Mr. Bigler, was working graveyards and went to bed on the evening of August 24th at about four-thirty in the afternoon (R. 213). Mrs. Bigler and three of the children went to a church gathering and arrived home at ten-thirty, p.m., at which time she awoke Mr. Bigler to go to work (R. 390-91). The family was awakened at six-thirty the next morning by the screams of the boys in the bedroom who discovered twelve to fourteen inches of water and sewage (caused by the flooding of the septic tank) in their basement (R. 333-34, 212-216).

Devan went immediately to the back of the property to see a full stream of water in the ditch (R. 334-35).

The defendant's own expert testified that the water in the ditch had to have been running from four to five and a half hours after the end of the turn to cause the damage done to the plaintiffs' residence (R. 476-87).

The defendant maintained at trial that it had no knowledge of how the water, during the night, got into the plaintiffs' ditch (Interrogatory No. 11, R. 518, 21). The defendant never conducted an investigation to determine the cause of the flooding (R. 515-518), though requested to do so on numerous occasions by the plaintiffs (R. 229, 230, 231).

Mysteriously, all of the records of the irrigation company

which would show where the water was when the Biglers were flooded were missing. The watermaster initially testified that the records for fourteen years were gone (R. 273). The watermaster then testified that someone had entered his truck (between July 18th and 20th, 1979) and stolen half of his records (R. 514, 276-78). In spite of the fact that some records were purportedly stolen on July 18, 1979, three weeks before the flooding, no explanation was made throughout the trial for the absence of the records of the water on August 24, 1979, one month after the alleged theft (R. 278-79, 298-99, 514-517). In fact, the records were available for all the shareholders involved up to approximately August 20, 1979, four days prior to the flooding (R. 274-80).

The defendant's agents and employees testified that the company should have had locks and chains on the headgates involved in causing the flooding of the plaintiffs' property (R. 75-76, 264-65).

The watermaster testified that contrary to his admitted duties and responsibilities he did not check the ditches on the night of August 24, 1979 (R. 296, 297) and in fact, checked them for the last time at four o'clock on the afternoon of August 24, 1979 (R. 296-97). The watermaster did not check the ditches involved in this action again until twelve o'clock noon on August 25, 1979 (R. 297-98). A period of twenty hours went by without any inspection or checking on twelve second feet of water (R. 296-97). In addition to the total derogation of his responsbilities, in failing to monitor the water, no records

of where the water had gone or where it was scheduled were ever written (R. 298-99).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE STANDARD OF CARE APPLICABLE TO THE CASE.

The trial court gave twenty-five instructions to the jury, three of which dealt with the specific duties of both the plaintiffs and the defendant (Instructions 7, 8 and 9; R. 103-5).

Instruction No. 7 informed the jury that the degree of care which a person is required to exercise increases in proportion to the hazards to be anticipated. That instruction is not excepted to by the appellant and accordingly, no further comment will be made regarding it.

Instruction No. 8 dealt specifically with the duty of the irrigation company and provided as follows:

> It was the duty of the defendant irrigation company, its agents and employees, in delivering water to its users, to observe and be aware of the conditions of their ditches, the amount of water therein and other existing conditions; in that regard, the defendant was obliged to observe due care with respect to:
>
> 1. To cause notice to be given to its users of their watering turn when water is turned into defendant's laterals from which the user takes its turn.
>
> 2. To use reasonable care to turn the water out of its lateral ditches when the watering turns are over.
>
> 3. To use reasonable care in knowing where the water is in its irrigation system to prevent the same

> from flowing into ditches where users are not on notice of its presence, or expectation in such ditch.
>
> The failure of defendant to exercise ordinary care in discharging the aforesaid duty shall be considered negligence depending on the particular surrounding facts and circumstances.

(R. 104). The appellant's only take exception to the third subpart of that instruction. To properly analyze Instruction No. 8, it is necessary to set out the instruction the court gave with regard to the responsibility of the plaintiffs. Instruction No. 9 provided as follows:

> The plaintiffs using the irrigation waters delivered through defendant's ditches were required to use reasonable care in taking the water onto their property, and turning it back into the defendant's ditches thereafter, to avoid such waters causing damage to their own and other persons property along the irrigation ditch. In that regard, the standard of care required of plaintiffs would be in accordance with the customary practice of the users of water on defendant's ditch; ordinary care in diverting the stream to their lands and in turning the water back to the defendant's ditch after their turn. The failure of plaintiffs to conform to said standard of care could be considered negligence, depending on the surrounding facts and circumstances of this case.

(R. 105).

It is the contention of the respondents that the trial court properly instructed as to the responsibilities of both parties in this action and that the conduct of the trial court should not be reversed on appeal for six reasons.

A. <u>The defendant failed to properly object to the giving of Instruction No. 8</u>.

The responsibility of trial counsel in objecting to jury instructions was set out by this Court in <u>Snyderville Transpor-</u>

tation Co., Inc. v. Christiansen, 609 P.2d 939 (Utah 1980). Chief Justice Hall speaking for the Court stated as follows:

> Under Utah law, a party on appeal may not assign as error either the giving or failure to give an instruction unless he first proproposes correct instructions, and should the court fail to give them, to then except thereto. The exception should be specific enough to give the trial court notice of every error in the instruction which is complained of on appeal.

Id. at 942. See also Employer's Mutual Liability Insurance Co. v. Allen Oil Company, 123 Utah 253, 258 P.2d 455 (1953); Redevelopment Agency of Salt Lake City v. Barrutia, 526 P.2d 47 (Utah 1974).

The facts of this case indicate that the defendant-appellants proposed seven jury instructions for consideration by the court (R. 87-93, 96). Not one of the instructions describes the duties and responsibilities of defendant-appellant as set out in Instruction No. 8. Defendant's proposed Instruction No. 1 simply states that the irrigation company is not an insurer against damages and proposed Instruction No. 2 simply states that the parties in this action are held to act in accordance with ordinary intelligence and prudence (R. 88, 89). All of the other instructions proposed by defendant deals specifically with the responsibilities of the plaintiffs.

In specifically dealing with Instruction No. 8, counsel for the defendant at trial simply objected to the giving of the instruction on the basis that it went beyond any established law in the state of Utah but failed to propose any alternative instruction which detailed the responsibility of the irrigation

company as perceived by counsel for the defendant (R. 571). In fact, the only comment of defendant's counsel relative to Instruction No. 8 was as follows:

> As to the instructions to be given, defendant takes exception to Instruction No. 8 on the ground that it goes way beyond any established law in the state of Utah and is prejudicial to the defendant. It also makes the company responsible for acts way beyond their control and it basically smacks that absolute liability of the defendant water company, regardless of other persons.

(R. 571).

It is respectfully submitted that the one paragraph comment by counsel for the defendant was certainly not sufficient to alert the trial court to the fact that the defendant was only objecting to subpart 3 of Instruction No. 8 nor was it sufficient to detail for the court what the defendant's specific objection was. As noted by the Court in Snyderville, supra, a party, before raising an instruction as error on appeal must first propose a correct instruction and then take a specific exception to the instruction given that is sufficient to give the trial court notice of every error in the instruction which is complained of on appeal. It is respectfully submitted that the instructions submitted by defendant-appellant were totally inadequate to describe the defendant's contention as to the duty of care that was applicable and further, that the exception taken by counsel to the giving of Instruction No. 8 was inadequate.

B. Instruction No. 8 correctly states the irrigation company's standard of care.

The Utah Supreme Court has analyzed the responsibility of an irrigation company on a number of occasions. In interpreting Utah Code Annotated §73-1-8 (1953 as amended), the early Utah Supreme Court cases clearly stated that the owners of canals or ditches used for irrigation had the duty of exercising ordinary care so as to prevent injury and damage to others and that the failure to exercise ordinary care and prudence constituted negligence for which the injured party may recover. Jensen v. Davis and Weber Counties Canal Company, 44 Utah 10, 137 P. 635 (1913); Chipman v. American Fork City, 46 Utah 134, 148 P. 1103 (1915); Mackay v. Breeze, 72 Utah 305, 269 P. 1026 (1928).

The Court dealt with the same question in detail in the case of West-Union Canal Company v. Provo Bench Canal and Irrigation, 208 P.2d 1119 (Utah 1949). In that case, the plaintiff claimed that the defendant negligently allowed the water from the South East ditch to run into Main Street and to wash sand, gravel, rubbish and debris into its canal and to greatly increase the quantity of water flowing therein, thereby causing the canal to fill up at the bridge and to break at the pipe intake at Skinner Hollow. The court found in favor of the plaintiff and awarded damages and the defendant appealed. The Utah Supreme Court affirmed and in that decision cited the long list of early Utah cases standing for the proposition that an irrigation company is liable for its negligence. The Court found that the defendant's failure to use reasonable care in properly regulating the flow water into the South East ditch was the proximate cause of the plaintiff's damages. Id., at 1123.

In Nestman v. South David County Water Improvement District, 16 Utah 2d 198, 398 P.2d 203 (1965), the plaintiff, a homeowner, sued the defendant irrigation district for damages caused to their home and its contents by flooding when the defendant's resevoir gave way. The Court spent the majority of the opinion analyzing whether or not the Doctrine of Soverign Immunity applied but again relied upon and cited to the previous cases for the proposition that a water supplier is responsible for its negligence. Id., at 205.

In Anderson v. Pleasant Grove Irrigation Company, 26 Utah 2d 420, 490 P.2d 897 (1971), this Court was faced with an action which is similar to the case at bar. In that case, the defendant company delivered water to its stockholders under the direction of a twenty-four hour a day watermaster who notified the shareholders of the time for their "turns" at using the water. Evidence was admitted in that case to the effect that a heavy volume of water caused an overflowing of the headgates and culverts. Other evidence reflected an overcapacity flow considerably in excess of that which the company and the watermaster knew would likely damage the property of landowners below. In that case, the defendants asserted on appeal that neither the irrigation company nor its watermaster had any duty to see where the water went, since that was the duty of the stockholders, after notice of their "turns". The same contention is made by the appellant in this case to the effect that there is no responsibility on the part of the irrigation company to use reasonable care to know where the water is in its irrigation

system or to prevent the water from flowing into ditches where users are not on notice of its presence.

This Court in Anderson, supra., in reply to the defendants' contention stated as follows:

> We cannot subscribe to such contention, since it connotes some kind of concept that an irrigation company and its watermaster may indulge the luxury of inoculation against liability by the simple device of sending a registered or unregistered letter or by making a telephone call, if you please, to its stockholders. Also, it seems to say that a primary duty not to injure others can be dissipated by an unwarranted and unlegal delegation of that obligation in order to immerse one with holy water rather than that which may drown oneself.

Id., at 198.

There can be no serious question that the Anderson, supra., decision stands for the proposition that an irrigation company must use reasonable care to monitor the location of the water in its irrigation system and to use reasonable care to prevent it from flowing into ditches where users are not on notice of its presence. Contrary to the argument of appellant in its brief, the jury instruction given by the court does not impose strict liability. The instruction simply requires that the defendant use reasonable care under the circumstances in knowing where the water is as specified in Anderson, supra.

The Court dealt with this subject again in Erickson v. Bennion, 28 Utah 2d 371, 503 P.2d 139 (1972). In that case, plaintiff sought to recover damages caused to their home and property by irrigation water which flowed there after use by the defendant. After the presentation of the plaintiffs' evidence, the defendant made a motion to dismiss which was granted by the

court. The facts in the case indicated that the defendant was an irrigation water user and that his waste water had flowed on the plaintiffs' property because of a widening of the Delta-Fillmore highway and because the plaintiffs had constructed a driveway by filling in the borrow pit which also had affected the drainage. The Utah Supreme Court affirmed the decision of the trial court on the basis that the plaintiffs had failed to prove that the defendant was in any way negligent and on the basis that the plaintiffs' contributory negligence in maintaining the driveway caused their own damages. In affirming the trial court, the Supreme Court made several comments relative to the responsibility of the irrigation water user.

> It is to be conceded to the plaintiff that the degree of care increases in proportion to the hazards to be anticipated; and that because of the dangers inherent in the management of flowing waters, the concept of ordinary care and prudence under the particular circumstances requires that its management not be left to novices, but should only be entrusted to persons of some experience and skill in the management of such waters, who would have an awareness of the various hazards in the failure to properly control them and would therefore exercise the degree of foresight and precaution which people of such experience and skill would observe to avoid injury or damage to others and their property.

Id., at 141.

It is respectfully submitted that the Erickson, supra, case stands firmly for the proposition stated in Instruction No. 8 that the management of irrigation waters is not to be left to novices and that the degree of care increases in proportion to the hazards to be anticipated and requires the persons who con-

trol the water to exercise that degree of foresight and precaution which people of such experience and skill would observe to avoid injury and damage to others.

The Court dealt once again with the subject in Dougherty v. California-Pacific Utilities Company, 546 P.2d 880 (Utah 1976). In that case, the plaintiff sued the utility company to recover for damages resulting from the flooding of their home by the overflow of the defendant's canal. The trial court found in favor of the plaintiff. In that case, the flooding was caused by an usually severe rain and hailstorm which caused the canal to rise and overflow its bank and flood the plaintiff's property. The defendant contended on appeal that the unusually severe storm was an Act of God. In retort, the Court stated:

> Whether the occurrence should be so classified as "an Act of God" depends upon whether the storm was of such magnitude and severity that it was not reasonably to be foreseen and guarded against by the traditional, reasonable and prudent man under the circumstances.

Id., at 882.

The Court then stated that since there was evidence that cloudbursts of considerable magnitude are noted in the area, that the trial court had the right to adopt the plaintiff's view of the evidence. Again, the Court cited to Utah Code Annotated §73-1-8 and cited it for the proposition that persons who handle irrigation water must be held to the standard of due care under the circumstances and that includes taking cognizance of the fact that the degree of care increases in proportion to the hazards anticipated. Id., at 882. The standard set out in the

Utah cases is entirely consistent with the weight of authority. See cases cited in Brizendine v. Nampa Meridian Irrigation District, 97 Idaho 580, 548 P.2d 80 (1976); Pince v. Phelen, 496 P.2d 905 (Wyo. 1972).

The case law in Utah supports the court's instruction that the defendant has a duty to use reasonable care in knowing where the water was in its irrigation system and to prevent the same from flowing into ditches where users are not on notice of its presence. Even aside from the rulings of the Supreme Court, the defendant's watermaster testified that it was his responsibility, recognizing the potential danger of flooding to make sure that he and the other employees of the company knew where the irrigation water was at any given time (R. 272, 275). Further, Lewis Snow, the watermaster, testified that it was his responsibility to keep an accurate written record of the location and use of the water throughout each day (R. 272, Ex. 18, 275). Snow testified that during the fourteen years of his service, he had always known where the water was and that the water, during that time, had never gone down the ditch by the plaintiffs' property unannounced (R. 282, 288, 204, 387). Finally, the watermaster testified that shareholders had a right to believe that they did not have to worry about water coming down the ditch unexpectedly (R. 281, 282, 288, 289, 314), and the plaintiffs testified that they did not ever think that there was any risk that the water would be in the ditch unexpectedly (R. 204, 205, 257, 387). In total derrogation of the defendant's responsibility, defendant company never conducted an investiga-

tion to determine the cause of the flooding (R. 515-518). Further, the records of the defendant company were never provided. The failure of the defendant company to justify or explain the absence of the records became almost a laughing matter at trial. It is respectfully submitted that the irrigation company either purposefully destroyed the records or simply did not furnish them despite demand by plaintiffs' counsel on the basis that they were incriminating. The defendant's own agents and employees testified that there should have been locks and chains on the headgates involved in causing the plaintiffs' damage which was the responsibility of the defendant company. Most importantly the watermaster testified that he left the water constituting twelve second feet at the Fullmer ditch and ninety second feet of the Strawberry Canal unattended for a period of twenty hours. It is respectfully submitted that the instruction given by the court correctly states the law as established by this court and also correlates with the responsibilities admitted to and undertaken by the defendant irrigation company.

C. The defendant irrigation company does not have the right to abandon the course of conduct undertaken by it.

It is the respondents' position that Jury Instruction No. 8 correctly states the law and that, in addition to the fact that it is a matter required by the applicable case law, the defendant's undertaking of the responsibility of monitoring the water at a given time and its representations to its shareholders that it monitored the water and that they had no reason to fear

that the water would be in the canal unexpectedly imposes an additional duty upon them.

The duty of a volunteer who undertakes to act was expressed by Justice Cardozo in Glanzer v. Shepard, 223 N.Y. 226, 135 N.E. 275 (1922):

> . . . It is ancient learning that one who assumes to act, even though gratuitously, must thereby become subject to the duty of acting carefully, if he acts at all . . .

135 N.E. 275, 276.

The modern counterpart of the rule set forth by Justice Cardozo is contained in Restatement 2d of Torts, §323:

> One who undertakes gratuitously or for a consideration, to render services to another which he should recognize as necessary for the protection of the others person or things, is subject to liability for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

It is respectfully submitted that all of the evidence in the case established that the defendant took upon itself the responsibility of monitoring the water and knowing its whereabouts at any given time. In addition, the defendant took upon itself the responsibility of keeping accurate records to determine where the water was at any given time. Based upon those undertakings, the company represented to its shareholders that it had no reason to worry or guard against the harm of water coming unexpectedly in their ditch.

All of the evidence supports the application of the Restatement

2d of Torts. The defendant failed to properly perform the duty it undertook in that the company failed to monitor the water and to keep accurate records. Those failures certainly increased the risk of flooding and as the plaintiffs testified throughout the proceedings, they left the headgate in on the basis that it was their understanding that water would not be in that ditch unexpectedly.

D. The appellant cannot claim for the first time on appeal that there were other causes of flooding to the plaintiffs' property.

In contending that Instruction No. 8 improperly characterized the law, appellant's argue on pages 6 and 7 of their brief that no evidence was presented at the trial court as to the source of the water that came down the ditch in the middle of the night. Contrary to the appellant's assertion of the fact, the plaintiffs' son, Devan, testified that when he was awakened in the morning by the large amount of water and sewage in the basement, he went to the back of his property where the irrigation ditch was situated and observed a full stream of water at that time (R. 334-35). In addition, the defendant's own expert testified that the water would have to be running from four to five and a half hours to cause the damage that it did to the plaintiffs' property (R. 476-87). To suggest at this juncture in the proceeding that the plaintiffs did not meet their burden of proof in showing the source of the water is simply rebutted by the evidence.

E. Subpart 3 of Instruction No. 8 does not impose strict

liability.

The appellant argues at great length that subpart 3 of Instruction No. 8 given to the jury imposes strict liability upon the defendant irrigation company. The instruction explicitly states that the defendant has a duty to use reasonable care in knowing where the water is in its irrigation system to prevent the same from causing damage. The instruction does not state that if the defendant did not know where its water was that it was negligence. In fact, the jury well may have concluded that the defendant had used reasonable care in knowing where the water was in the irrigation system and that reasonable care does not require that the defendant know where the water is at each and every point in time.

The problem that the appellant has on appeal is that the argument contravenes the representation of the defendant company made at trial that it did know where the water was at each and every point in time and that it considered it a responsibility to both know and to document where the water was.

Likewise, the instruction requires only that the defendant irrigation company use reasonable care in preventing the water from flowing into ditches where users are not on notice of its presence. The instruction does not indicate that if the jury finds that water is in a ditch or notice has not been given, that it is strictly liable or that it is even negligent. Again, the jury could have well determined that the facts and circumstances as presented by the testimony did not warrant an imposition of liability on the part of the defendant simply because

the water was in the ditch. The jury was given the prerogative to weigh all of the facts and circumstances in the case.

Finally, it was again the testimony of the defendant's agents and employees at trial that imputed liability to them. It was the defendant's agents and employees that testified that the policy of the irrigation company was that no water would be turned to a water user unless notice had been given to them. It was the defendant's agents and employees who testified that in fourteen years no water had ever been in that ditch unannounced and that the persons operating in the Mapleton Irrigation Canal Company had a right to assume that water would not be in the ditch unless they were put on notice. In fourteen years, the ditch had never been used for run-off water or waste water from any other distribution system aside from the routine regular irrigation turns. The representation to the Court that Instruction No. 8 is tantamount to imposing a strict liability test upon the defendant-appellant, is simply without merit.

F. Subpart 3 of Instruction No. 8 does not require the irrigation company to give notice every time the ditch is used to transport water.

On page 10 of the appellant's brief, the point is made that subpart 3 of Instruction No. 8 requires the irrigation company to notify all property owners when water is passing through the sublateral ditch to another location. Again, appellant's argument totally misconstrues the instruction.

There is nothing in subpart 3 of Instruction No. 8 that requires the irrigation company to notify users every time water

is in a ditch. The instruction simply requires the irrigation company to use reasonable care to keep water from flowing into ditches where users are not on notice of its presence or expectation in such ditch. It is impossible to analogize the facts of the present case to the broad principles announced in the appellant's brief.

This is not a case where the ditch in question is sometimes used to provide irrigation water to property owners and at other times is used to transport water downstream for another series of property owners or to conduct waste water. The testimony at trial was that the ditch in question was never used to transport water to any other group of landowners than the ten property owners set out in the statement of facts. It was further the testimony that the ditch in question was never used to transport waste water or used for any other purpose. Again, the testimony by Doc Snow, the watermaster, the plaintiffs and other persons testifying was that for fourteen years water had never been down that ditch except to irrigate the land belonging to the ten property owners. It was based upon the peculiar nature of the ditch in question that the court gave the instruction that the irrigation company owed its shareholders reasonable care to keep water from going down the ditch unless water users were put on notice of its presence or expectation. Again, the fact that the irrigation company did not give notice does not mean by itself they were guilty of negligence. The instruction says firmly that they are only required to use reasonable care and does not state that the lack of notice

equates with negligence.

POINT II

THE JURY FINDING OF NEGLIGENCE ON THE PART OF APPELLANT IS SUPPORTED BY THE EVIDENCE.

The standard that this court uses in reviewing the determination made by a jury has been stated on a number of occasions. In Cinpron v. Milkovich, 611 P.2d 730 (Utah 1980), the Utah Supreme Court noted:

> The existence of conflicting testimony is of no warrant. It was the jury's prerogative to determine which evidence was to be credited and to draw reasonable inferences from that evidence, Marsh v. Irvine, 22 Utah 2d 154, 449 P.2d 996 (1969); of course we view the evidence in the light most supportive of the verdict. Johnson v. Cornwall Warehouse Co., 15 Utah 2d 172, 389 P.2d 710 (1964).

Id., at 732.

This Court has also stated that in reviewing a jury determination, the court will assume that the jury belived those aspects of the evidence which sustained the findings and judgment and therefore makes it analysis of the case and draws its conclusions on the basis of facts so found. Gossner v. Dairyland Associates, Inc., 611 P.2d 713 (Utah 1980); Ute-Cal Land Development Corp. v. Sather, 605 P.2d 1240 (Utah 1980); Lamkin v. Lynch, 600 P.2d 530 (Utah 1979).

It is respectfully submitted that there was ample evidence upon which the jury could find the defendant negligent. All of the bases are set forth in the statement of facts and accordingly only a summary of the evidence will be provided.

First, Lewis Snow, the watermaster testified that he

recognized the potential dangers of flooding and that in accordance with the recognition of that hazard, it was the company's responsibility to make sure that he or other employees knew where the irrigation water was at any given time. Despite the company's recognition that it was their responsibility to make sure that the location of the water was known, the agents and employees of the defendant left twelve second feet of water essentially unaccounted for and unmonitored for twenty hours.

Second, the agents and employees of the defendant testified that it was the company's responsibility to keep an accurate written record of the location and use of the water. In that regard, the watermaster testified that during the fourteen years of his service, he had always known where the water was and had kept records relating to its use. Despite the fact that the company recognized that as a responsibility, the appellant simply refused and neglected to fulfill its committment. The testimony indicated that some records were taken supposedly between July 18th and 20th. The defendants were never able to show any water users whose records of use had been lost. Further, even though records were taken between July 18th and 20th, no explanation was ever made as to the location of the water records after that period of time up and through the date of the flooding. Both the watermaster, the director and president of the company were unable to reply or answer the simple queries.

Third, the watermaster for the defendant testified that it was his responsibility to purchase and inspect locks for the headgates and to maintain control over those diversionary

structures. The evidence at trial indicated that the agents and employees of the defendant, after the flooding, admitted that there should have been locks on the headgates that divert the water to the plaintiffs' property. Obviously, the lock on the headgate would have prohibited the diversion of the water down the ditch that led to the plaintiffs-respondents' property without an overt act by the defendant's agents and employees.

On page 13 of the appellant's brief, the statement of the agents and employees of the defendant to the effect that the gates involved should have been chained and locked is referred to as a hearsay statement. It should be noted that counsel for the defendant did not object to the evidence (R. 230), and the statement of the president of the board and one of the board of directors is clearly within the scope of Utah Rules of Evidence 63(7) and (8) which relate to statements made by persons in their individual or representative capacity.

Fourth, in answers to interrogatories, in depositions and on the witness stand, the agents and employees of the defendant testified that it was the policy of the Mapleton Irrigation Canal Company to inform the stockholders individually by making a personal call or having a person up the ditch notify them, every time water was to be in their particular ditch. Explicitly, the defendants stated in answer to interrogatories that if the shareholder was not notified, water was not to be turned to the shareholder. Further, Doc Snow, the watermaster for the appellant testified that based upon his representations to them, shareholders had a right to believe that they did not have to

worry about water coming down their ditch unexpectedly. Contrary to the explicit representations and warrantees of the agents and employees of the defendant, the defendant's agents and employees failed to monitor the water and take the other necessary steps to comply with their own self-imposed standard. The plaintiffs-respondents and the other persons on the ditch simply had no reason to believe that there was any risk that the water could get into the ditch unexpectedly.

Fifth, the watermaster for the appellant and the respondents testified that in fourteen years, the water had never been in the ditch unexpectedly and that at no time, was waste water or other overflow water ever in the ditch. Further, all of the testimony was conclusive that the ditch which serviced the respondents had no other purpose and did not serve to convey water to landowners at some point distant from the plaintiffs. In direct contravention of the experience of the respondents and the representations of the appellant, the appellant ran its system in such a manner wherein water could go unmonitored for twenty hours and the defendant would have no record or any other means available to him to isolate the problem or the source.

Sixth, the respondents were told by the agents and employees of the defendant that the water turns, depending on the time of the year, would be separated from ten days to three weeks. Contrary to the representations that water turns would never be closer together than ten days, the appellant failed to monitor the ditch or take other steps to assure the accuracy of

their representations.

In short, the jury had ample cause to believe that the appellant had failed to exercise ordinary care in discharging the duty set out in Instruction No. 8 and to, therefore, find the appellant negligent.

The last point raised by the appellants under Point II that the jury finding of negligence was improper, is the argument that the court's exclusion of testimony relating to how other irrigation canal company's work was error. Counsel for the appellant proffered the testimony of the expert as follows:

> He would testify that inasmuch as he worked with most of the irrigation companies in the valley, in fact, all of them, I believe, and am most familiar with their operation, and those irrigation companies that had a turn system, such as the Springville system, and he was familiar with those, the obligation was upon the water users to open and close his headgate, and he was to be responsible for the headgate at all times. That's all.

(R. 567). It is respectfully submitted that the proffer made by counsel was totally inadequate. It is hard for counsel for respondents to understand the meaning or intent of the proffer. The proffer would seem to indicate that the expert would testify that he was familiar with the operation of a number of irrigation companies that had a turn system similar to the Springville system and that under those turn systems, the obligation was upon the wateruser to open and close his headgate and that the wateruser was responsible for that headgate at all times. The proffer does not state that the turn system or Springville system is analogous to that used by the Mapleton Irrigation Canal

Company. Further, there is no proffer to the effect that the by-laws, policies and procedures of the other systems in the valley are similar to any degree to that used by the appellant. Further, there is no indication in the proffer that the expert was familiar with the irrigation companies at the time that the flooding took place. As stated by the trial court, "the only relevant testimony in that regard would be the custom on this particular ditch" (R. 67).

POINT III

THE JURY'S FINDING THAT THE RESPONDENTS WERE NOT CONTRIBUTORILY NEGLIGENT IS SUPPORTED BY THE EVIDENCE.

The test that this court has used in reviewing the actions of a jury were set out in Point II. Again, the facts relating to the issues of negligence and contributory negligence were set out in full in the statement of facts. Again, only a basic recital of those facts is set forth. The jury had ample evidence to support the belief that the respondents were not contributorily negligent in leaving the headgate in place on August 24, 1979.

First, for fourteen years, water had never been down the respondents' ditch unexpectedly.

Second, the ditch that serviced the respondents' property was not used to transport water to any other location and was not used to transport waste water and was, in fact, only used on a scheduled water turn.

Third, the water turns on the ditch had intervals from ten days to three weeks. The agents and employees of the appellant and the respondents testified that at no time during the four-

teen years had water been in the ditch the day after a water turn.

Fourth, the agents and employees of the defendant explicitly represented that no water would in the ditch unless the water users were informed.

Fifth, it was the custom and practice of the last person to use the water to leave the headgate in so that whatever water remained in the ditch as the water was shut off would not be diverted on property which had already watered.

Sixth and finally, the respondents testified unequivocably that they did not even comprehend the risk that their property would be flooded by leaving the headgate in.

CONCLUSION

It is respectfully submitted that Instruction No. 8 correctly states the law of the State of Utah as it has been promulgated by the case law and by statute. Further, the instruction clearly sets forth the duty as promulgated by the appellant itself upon which the respondents had a right to rely. Section 3 of Instruction No. 8 together with the remainder of Instruction No. 8 are all couched in the duty of the defendant to use reasonable care and does not mandate that the defendant has specific mandatory duties and actions. The instruction explicitly states that the failure of the defendant to exercise ordinary care in discharging any of the responsibilities set out in Instruction No. 8 could be considered negligence depending upon the particular surrounding facts and circumstances.

It is the respondents' position that there is ample evi-

dent in the transcript upon which the jury could support a finding of negligence on the part of the appellants and the lack of any contributory negligence on the part of the respondents. The jury, in weighing the evidence and testimony, simply found that the appellant had failed to observe the duties recognized by law and recognized by its own regulations and procedures.

It is respectfully submitted that the verdict of the jury and the damages assessed only compensate the respondents for a clear breach of duty by the agents and employees of the appellant.

DATED this 19 day of August, 1982.

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HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiffs-
Respondents

MAILED a copy of the foregoing BRIEF OF RESPONDENTS to Mr. Michael L. Deamer, UNGRICHT, RANDLE & DEAMER, Attorneys for Appellants, Suite 514 Boxton Building, 9 Exchange Place, Salt Lake City, Utah 84111; dated this 19 day of August, 1982.

SECRETARY